

No. 07-15124

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF YOSEMITE VALLEY, et al.

Plaintiffs-Appellees

v.

DIRK KEMPTHORNE, Secretary or the Interior, et al.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OPENING BRIEF OF APPELLANTS

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GLOSSARY

CMP	Comprehensive Management Plan
CEQ	Council on Environmental Quality
ER	Excerpts of Record
NEPA	National Environmental Policy Act
NPS	National Park Service
ORVs	Outstandingly Remarkable Values
RPO	River Protection Overlay
SEIS	Supplemental Environmental Impact Statement
VERP	Visitor Experience and Resource Protection
WIMS	Wilderness Impact Monitoring System
WSRA	Wild and Scenic Rivers Act

JURISDICTION

The district court's jurisdiction was invoked pursuant to 28 U.S.C. 1331 (federal question). The district court issued an interlocutory injunction on November 3, 2006. Excerpts of Record (ER) 1195. Defendants filed a timely notice of appeal from that injunction on December 28, 2006. ER 1220. The Court's jurisdiction over this appeal rests on 28 U.S.C. 1292(a)(1).

The district court entered a final judgment in this case, resolving all issues, on March 28, 2007. ER 1233. Defendants filed a timely notice of appeal from that judgment on April 24, 2007. ER 1234. That appeal, No. 07-15791, was docketed on May 3, 2007. Defendants intend to move to consolidate the appeals. No additional briefing will be necessary, as this brief covers all issues defendants intend to raise on appeal. Jurisdiction for the appeal from the final judgment rests on 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The overarching issue in this appeal is whether the National Park Service (NPS) has remedied the specific deficiencies in the Comprehensive Management Plan (CMP) for the Merced Wild and Scenic River that this Court found in Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003) (Yosemite I). The NPS prepared a revised CMP that addressed the deficiencies identified by this Court in Yosemite I, and prepared a Supplemental Environmental Impact Statement (SEIS). The specific issues presented in this appeal are:

1. Whether the district court erred in concluding that the Revised CMP failed to comply with the Wild and Scenic Rivers Act (WSRA) because it allegedly did not contain sufficiently specific or permanent limits on user numbers to comply with the WSRA requirement that a such a plan “address user capacities.”

2. Whether the district court erred in concluding that the Revised CMP was deficient because it was presented as a revision to the CMP issued in 2000, instead of as a wholly self-contained plan, when this Court had instructed that the 2000 CMP could be “revised” to cure the two deficiencies found by the Court.

3. Whether the district court erred in concluding that the SEIS prepared for the Revised CMP violated the National Environmental Policy Act (NEPA) by relying on elements of the 2000 CMP that had been upheld by the district court and this Court in the earlier round of litigation.

STATEMENT OF THE CASE

This controversy was before the Court previously, resulting in two related opinions, Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003) (Yosemite I), and Friends of Yosemite Valley v. Norton, 366 F.3d 731 (9th Cir. 2004) (Yosemite II).^{1/} The issues in this appeal center around whether NPS has complied with this Court’s rulings in those decisions, where the Court found two specific deficiencies in the 2000 CMP and remanded for correction of those

^{1/} The published versions of this Court’s two opinions, along with the published district court opinion on summary judgment, are set out in the Addendum.

deficiencies in a “new or revised CMP that adequately addresses user capacities and properly draws the river boundaries at El Portal.” Yosemite II, 366 F.3d 731.

A. The Ruling in Yosemite I. – In Yosemite I, this Court reviewed a district court judgment that rejected all but one of plaintiffs’ challenges to the NPS’s 2000 CMP for the Merced Wild and Scenic River. This Court explained the requirements of the WSRA, and how NPS had addressed those requirements in the 2000 CMP (348 F.3d at 795):

The CMP provides seven management elements that govern all future actions affecting the designated portions of the Merced under the NPS’s administration. In an effort to comply with specific provisions of the WSRA, the CMP: (1) delineates river area boundaries, see 16 U.S.C. § 1274(b); (2) classifies segments of the designated section as wild, scenic, or recreational, see id.; (3) describes the “outstandingly remarkable values” (“ORVs”) of each area, see id. §§ 1271, 1281(a); and (4) provides for compliance with the WSRA’s restrictions on water resources projects, see id. § 1278. Additionally, the CMP: (5) establishes a minimum buffer zone called the River Protection Overlay (“RPO”); (6) creates management zones for lands within the selected boundaries; and (7) institutes a framework called Visitor Experience and Resource Protection.

The Court described in detail the last three elements of the CMP mentioned above. It noted that the River Protection Overlay (RPO) provided “relatively stringent limits on actions to be taken” within the area near the River, and that the management zones “provide overall guidance for decision-making over the long term.” Id. The Court then described the Visitor Experience and Resource Protection (“VERP”) element of the 2000 CMP, noting that this element was the

“primary mechanism” chosen by NPS for addressing user capacity issues. Id. at 796.

In lieu of specific numerical limits on visitors, which the NPS claims would be insufficiently precise given the “wide variety of resources and patterns of usage” in Yosemite, the VERP framework focuses on the prescription and maintenance of selected “desired conditions.”

Id. To maintain “desired conditions,” the VERP framework provided for “selecting and monitoring indicators and standards that reflect these desired conditions, and taking management action when the desired conditions are not being realized.” Id. (quoting from 2000 CMP).

The Court found a problem with this aspect of VERP as set out in the 2000 CMP: “[t]he CMP * * * establishes no specific indicators or standards to implement the VERP process; instead, it provides examples * * *.” Id. Providing mere examples of indicators or standards, the Court noted, was inconsistent with Guidelines promulgated by the Secretaries of the Interior and Agriculture which indicate that CMPs should state “the kinds and amounts of public use which the river area can sustain without impact to the [ORVs].” Id. at 797, quoting Secretarial Guidelines, 47 Fed. Reg. at 39,458-59. The Guidelines, the Court noted, “clarify that the WSRA obliges the administering agency to provide actual limits in its CMP * * *.” Id. Merely providing examples of standards and indicators that might be developed over time fell short of the requirement to have actual limits stated in the CMP. Id.

This Court made clear, however, that the VERP framework could serve as the principal method for addressing user capacity if the identified flaw was corrected:

This does not mean that the NPS is precluded from using the VERP to fulfill the user capacities requirement. However, the WSRA does require that the VERP be implemented through the adoption of quantitative measures sufficient to ensure its effectiveness as a current measure of user capacities.

Id. The Court recognized that a revised VERP framework would take time to implement, and suggested that, “[i]f the NPS is correct in projecting that it will need five years fully to implement the VERP, it may be able to comply with the user capacity mandate in the interim by implementing preliminary or temporary limits of some kind.” Id. Summing up its discussion of VERP, the Court instructed that “[o]n remand, the NPS shall adopt specific limits on user capacity consistent with both the WSRA and the instruction of the Secretarial Guidelines that such limits describe an actual level of visitor use that will not adversely impact the Merced’s ORVs.” Id.

The Court next addressed the river corridor boundaries element of the 2000 CMP. It found a deficiency in the way the boundary had been drawn in the 4-mile segment of the River downstream from Yosemite Valley at El Portal, and ruled

that, “on remand the NPS must redetermine the river area boundaries at El Portal under the proper standard.” Id. at 799.²⁷

This Court rejected all other challenges to the 2000 CMP. Rebuffing plaintiffs’ attack on the sufficiency of the data in the 2000 CMP and EIS, this Court found that:

With the exception of the user capacities and river boundaries discussed above, the CMP was prepared with sufficiently specific data and information to satisfy [WSRA] § 1281(a)’s goal of protecting and enhancing ORVs. Moreover, the CMP contains satisfactory detail under both the WSRA and NEPA to fulfill its role as a programmatic management plan.

Id. at 799. The Court also rejected a claim that NPS had failed to cooperate with state and federal authorities for the purpose of eliminating or diminishing water pollution. Id. at 801. The Court’s concluding paragraph summarized its rulings, and stated that:

We remand for the district court to enter an appropriate order requiring the NPS to remedy these deficiencies in the CMP in a timely manner. Inasmuch as the NPS was supposed to have completed a CMP for the Merced River some twelve years ago, we would also expect that the NPS would implement, as soon as is practicable, temporary or provisional measures designed to avoid environmental degradation pending the completion of its task.

Id. at 803-804.

²⁷ NPS redetermined the river boundary at El Portal in the 2005 Revised CMP, and that aspect of the Revised CMP was upheld by the district court. Friends of Yosemite Valley v. Scarlett, 439 F. Supp. 2d 1074, 1103 (E.D. Cal. 2006) (see Addendum). Accordingly, we do not further discuss the issue in this brief.

B. *Yosemite II* Clarifies That NPS Could Complete Either a “New or Revised” CMP, But Until That Was Done There Was No Valid CMP in Place.

– On remand from Yosemite I, plaintiffs requested an injunction from the district court to stop ongoing and planned projects in the Merced River corridor pending compliance with this Court’s instructions. On March 26, 2004, the district court denied the plaintiffs’ request for injunctive relief, noting *inter alia* that “Plaintiffs have failed to establish that the Ninth Circuit’s opinion invalidates the existing MRP [Merced River Plan].” ER 28. Plaintiffs appealed and moved for an emergency injunction pending appeal. On April 20, 2004, the panel that decided Yosemite I (Judges Wardlaw, Tashima and Goodwin) granted the emergency motion and issued a one-page published order “to clarify our Opinion of October 27, 2003.” The Court explained that it had “held that the entire Merced Wild and Scenic River Comprehensive Management Plan (‘CMP’) is invalid due to two deficiencies.” Yosemite II, 366 F.3d 731 (see Addendum). The Court explained that the district court had erred by denying injunctive relief on the assumption that this Court had not found that the 2000 CMP was invalid. This Court instructed that, “[p]ursuant to our original Opinion, the National Park Service (NPS) must prepare a new or revised CMP that adequately addresses user capacities and properly draws the river boundaries at El Portal.” Id. The Court remanded for reconsideration of plaintiffs’ motion “in light of this clarification of our prior holding” and granted a “temporary stay of proceedings and an injunction

prohibiting NPS from implementing any and all projects developed in reliance upon the invalid CMP.” Id.

C. NPS Issues a Revised CMP and SEIS to Cure the Deficiencies in the 2000 CMP. – Following Yosemite II, the district court directed NPS to “issue a new or revised CMP for the Merced River within one year” and to comply with this Court’s judgment:

[B]y remedying in a timely manner the deficiencies found in the MRP, i.e., insufficient addressing of user capacities and improper setting of river area boundaries within El Portal. In creating the new or revised CMP, NPS shall comply with NEPA by issuing a supplemental EIS.

July 6, 2004, Memorandum Opinion and Order, ER 72. The district court enjoined certain projects “pending completion of a new or revised CMP for the Merced River.” ER 72-73.

On July 27, 2004, the Park Service published a Notice of Intent to prepare a supplemental EIS on a Revised CMP. 69 Fed. Reg. 44,678 (2004). Public scoping meetings were held in August 2004. ER 182. The “Draft Merced Wild and Scenic River Revised Comprehensive Management Plan and Supplemental Environmental Impact Statement” was released for public review in January 2005. Eleven public meetings were held throughout California in February and March 2005. In addition to public testimony received at these meetings, NPS received 147 letters containing over 900 distinct comments during the review period. ER 182, 577.

1. The Revised CMP and the User Capacity Management Program.

In June 2005, NPS issued a combined document entitled “Merced Wild and Scenic River – Revised Comprehensive Management Plan and Supplemental Environmental Impact Statement.” [Pertinent provisions of the Revised CMP and SEIS are reprinted at ER 164-788.] The NPS issued the Revised CMP to remedy the deficiencies in the original CMP, by adopting a comprehensive program containing specific measurable limits that address user capacity in the river corridor and an expanded boundary for the El Portal segment of the river. The Revised CMP explained that NPS was retaining certain elements from the 2000 CMP. The retained elements include: boundaries within Yosemite National Park (including main stem and South Fork), classifications, ORVs, the WSRA § 7 determination process, management zones (except for El Portal), and the River Protection Overlay (RPO). ER 192. These pre-existing management elements from the 2000 CMP would work together with the revised User Capacity Management Program to ensure the protection of the ORVs of the Merced Wild and Scenic River. ER 192-203.^{3/}

^{3/} The NPS completed a Revised CMP Presentation Plan in December 2005, to provide a streamlined reference volume. The Presentation Plan contains all of the elements that comprise the management plan for those segments of the Merced Wild and Scenic River administered by the NPS, whether they derive from the 2000 CMP or the 2005 Revised CMP. Relevant portions of this document can be found at ER 826-996.

The new User Capacity Management Program in the 2005 Revised CMP includes several mechanisms to address the types and amount of visitor use that will be allowed in the Merced River Corridor. The program includes numeric limits on the numbers of people, limits on activities, limits on facilities, limits on environmental and experiential conditions, and interim limits on people and facilities. ER 214-248, 276-283.

A key component of the program is VERP. ER 239-248. The Revised CMP's VERP program includes a suite of specific indicators and measurable standards along with a rigorous monitoring program to ensure that each indicator remains within its designated standard.^{4/} Indicators and corresponding standards are listed in Table II-5 of the Revised CMP. ER 249-256. Indicators and standards were developed to ensure that "desired resource conditions and visitor experience opportunities," which are derived from the Management Zoning elements, are being achieved. ER 239. If monitoring indicates that ORV protection standards are not being met, VERP requires the NPS to take timely action to bring conditions within the accepted range necessary to protect ORVs. See ER 242-244. VERP contemplates that park managers will proactively prevent degradation before it

^{4/} The 2005 Revised CMP explains that "Indicators are defined as specific, measurable physical, ecological, or social variables that reflect the overall conditions of a zone. Standards are defined as the *minimum* acceptable condition for each indicator variable." ER 165 n.3 (emphasis in original).

occurs. VERP standards are set to prompt early warning and trigger action before degradation of ORVs occurs. See ER 242-243 and infra at 30-31.

Another component of the User Capacity Management Program is the Wilderness Trailhead Quota System and the Wilderness Impact Monitoring System (WIMS). ER 217, 220-222. The Wilderness Trailhead Quota System imposes specific limits on the number of overnight users allowed within the Wild segments of the river, which comprise 51 of the 81 miles of the Merced River under NPS management. ER 222. The Trailhead Quota System's effectiveness at protecting wilderness resources is monitored through WIMS.^{5/}

Other protective mechanisms in the User Capacity Management Program are found in the Superintendent's Compendium. The Compendium includes park-specific regulations that limit the time and location of specific activities, or impose limits on the numbers of people allowed to engage in specific activities. The Compendium limits overnight group size to 15 people in wilderness areas if using established trails, off-trail day use and overnight group sizes to eight people in wilderness areas, and stock animals to 25 animals per group. Non-motorized water craft are only allowed in one portion of the Valley segment of the Merced River at certain times of the day. ER 222.

^{5/} With the adoption of the VERP framework, VERP monitoring will now also be conducted in the wild river segments, along with WIMS monitoring.

The User Capacity Management Program also includes interim limits that will restrict the types and levels of visitor use in the Merced River corridor until the VERP program is fully implemented. ER 281-283. See Yosemite I, 348 F.3d 803-804 (suggesting interim limits for the period of VERP implementation). These place numeric limits for overnight lodging units, camping spaces, day-visitor parking spaces, bus parking spaces, tour buses allowed into Yosemite Valley, and corridor-wide employee housing. Day-visitor parking spaces and bus parking spaces are set at existing levels; thus, no new parking spaces would be created during the interim period. ER 282. Overnight lodging facilities would also remain at current levels. The number of campsites in Yosemite Valley would be allowed to increase slightly during the interim period by 163 sites, which is still below the number of campsites in the Valley prior to the 1997 flood and below the number present in 1987 when the Merced River was designated Wild and Scenic. ER 279 (Table III-4), 283-284. The interim facility limits, which serve as a proxy for limiting visitor use, will be in place for approximately five years while VERP is being refined. They will not be eliminated unless and until NPS is confident that VERP is providing sufficient information on visitor use to protect and enhance ORVs. NPS will present a report to the public that addresses the VERP program's effectiveness, and in that report will propose either to continue, modify, or eliminate the interim limits. ER 280-281.

2. The SEIS.

In compliance with the district court's July 6, 2004 order, NPS prepared an SEIS to examine the environmental effects of the Revised CMP. This SEIS, published as part of the same document as the Revised CMP, examined four alternatives. The "preferred alternative" included the User Capacity Management Program, as described in the preceding section of this brief, and an expanded boundary at El Portal. ER 276-289. Alternative 1 – the "no action" alternative – would have managed the river corridor under the 2000 CMP without the specific indicators and standards that had been developed in response to this Court's ruling and without the changes in the El Portal boundary. ER 268-275. Alternative 3 would have included all the components of the preferred alternative, but would have added a maximum daily visitor limit for each river segment, a maximum annual visitation limit of 5.32 million, and a daily limit on the number of day hikers to Half Dome. ER 290-301. Alternative 4 would have established maximum use levels within each management zone, based on capacity factors for the average number of people per unit area, and would have imposed a maximum annual visitation limit of 3.27 million. ER 302-310.

3. Implementation of the User Capacity Management Program.

The NPS began to implement and refine the new VERP monitoring and management framework even before the Revised CMP was issued in 2005. In the summer of 2004, NPS staff drafted and refined indicators and standards and

prepared detailed monitoring protocols and field guides. Subsequently, staff collected field data, analyzed the results from monitoring, and reported findings to the public. NPS staff tested a series of indicators, including Campsite Number and Condition (two separate indicators simultaneously monitored), Number of Encounters with other Parties along Wilderness Trails, People At One Time at Selected Sites, Exposed Tree Roots in Wilderness Campgrounds, Number of Social Trails in Wetlands, Length of Social Trails in Meadows, Riverbank Erosion that is Accelerated or Caused by Visitor Use, Exposed Tree Roots in Developed Campgrounds, and Water Quality. ER 998-1048.

After the 2004 season, refinements were made to all monitoring protocols and, in some cases, the NPS developed more rigorous definitions of the indicators. Monitoring results were used to assess the effectiveness of the indicators and standards. Of the ten indicators monitored, six were determined to be providing useful informative and four were replaced in favor of indicators that provided a more sensitive and precise measure of visitor use impacts. ER 1043.

During 2005, NPS continued to collect VERP data, including data on the four new indicators, which were Wildlife Exposure to Human Food; Occupied Parking Versus Capacity; Extent/Magnitude of Plant Species used by Local Tribal Groups; and Availability of Day Use Facilities. ER 1043; 1084-1092. The NPS has committed substantial financial and personnel resources to implementing the VERP process, including hiring a full-time VERP Program Coordinator. VERP

already has begun to provide the park with timely and informative data about the condition of resources and ORVs in the Merced River corridor. ER 998-1048; 1075-1093.

D. Plaintiffs Challenge the 2005 Revised CMP. – On November 11, 2005, plaintiffs filed a supplemental complaint to challenge the revised CMP, alleging that it failed to comply with WSRA, NEPA, and this Court’s orders. ER 76. NPS lodged the administrative record, and the parties filed cross-motions for summary judgment.

After briefing, the district court on July 19, 2006, issued an opinion and order granting plaintiffs’ motion for summary judgment on their principal WSRA and NEPA claims. Friends of Yosemite Valley v. Scarlett, 439 F. Supp. 2d 1074 (see appendix). The court first found that the 2005 Revised CMP was deficient because it was not a “wholly self-contained” plan that “contains all management decisions and environmental analyses” in one document, but instead relied on parts of the 2000 CMP that had been upheld in earlier litigation. 439 F. Supp. 2d at 1092; see also id. at 1094 (“[t]his court finds that language from the Ninth Circuit indicates an intention that a single document be produced, covering everything”). The court further held that “the VERP program in the 2005 Revised Plan is inadequate to constitute the primary feature of a user capacity program that must ‘describe an actual level of visitor use that will not adversely impact the Merced’s ORVs.’” Id. at 1100, quoting Yosemite I, 348 F.3d at 797. The court criticized the

VERP standards and indicators in the Revised CMP as “reactive” measures, allegedly calling for management action only after environmental degradation had occurred. Id. at 1100. The court also found that NPS erred by not adopting VERP as its “permanent primary method for addressing user capacity.” Id. at 1099.

The district court next held that the SEIS prepared for the 2005 CMP did not comply with NEPA. The court found that the “no action” alternative in the SEIS improperly relied on elements of the 2000 CMP to describe the environmental baseline. Id. at 1105. The court also found that the range of alternatives considered was insufficient because all of the action alternatives used VERP as one element of their respective user capacity limits. Id. at 1106. The court postponed a decision on remedy pending further briefing.

In September 2006, plaintiffs moved to enjoin all ground-disturbing activities in the Merced River corridor, as well as several specific planned projects, until NPS had completed and the court approved a valid CMP and EIS. The NPS opposed the motion and filed declarations and documentary exhibits which were admitted into evidence at a hearing held on October 10, 2006. On November 3, 2006, the district court issued an opinion and order enjoining all or significant aspects of nine projects until the NPS had developed a valid CMP. ER 1195-1219. The district court deferred setting a specific deadline for a new CMP. ER 1217.

Defendants appealed from the district court's November 3, 2006, injunction. ER 1220. They also moved, pursuant to Fed. R. Civ. P. 62(c), to stay two elements of the injunction pending appeal, namely the injunctions against continuation of the East Yosemite Valley Utilities Improvement Plan and against the Yosemite Valley Loop Road rehabilitation project. After considering an extensive evidentiary record, the district court granted a stay pending appeal of its injunction against these two projects, with certain exceptions. ER 1222. The court noted that:

In light of the scarcity of case law regarding comprehensive management plans under WSRA, a reality previously noted by all of the parties in this case, the court finds that Defendants do present serious questions regarding this court's rulings on the 2005 Revised Plan.

ER 1224. The court found that, "the issue is thus whether Defendants have shown that the balance of hardships tips sharply in their favor so as to support the stay they seek." *Id.* With respect to the Utilities Improvement Plan, the district court found that the NPS declarations had made clear that NPS would take needed action to "consolidate utilities where necessary to relocate deteriorated sewer lines from sensitive resource areas into existing roadways or into less sensitive areas," and would focus sewer line relocations on the prevention of future sewage spills. ER 1226. The court found that "the need to protect both public health and safety and the ecologically sensitive habitats along the Merced River Corridor shifts the balance of equities sharply in favor of allowing Defendants to proceed with

implementation of the Utilities Plan to the extent that they propose.” ER 1227.

Regarding the loop road, the district court found that the purpose of the project was to “rehabilitate an existing failing roadway” that provides the only vehicular access to Yosemite Valley, and that the project will “restore the condition and function of the road drainage system” and “protect resources, by defining the limits of existing pullouts” as well as “correct existing road safety hazards.” Id.⁹

On March 28, 2007, the district court issued a further order approving the parties’ stipulation regarding a completion date for a new CMP. Pursuant to the stipulation and order, NPS must complete a new CMP and EIS on or before September 30, 2009, and make periodic progress reports before that. ER 1230-31. The stipulation and order are without prejudice to the Park Service’s right to appeal. ER 1231. A final judgment was entered on March 28, 2007. ER 1233.

⁹ Even with the stay, there are many important park initiatives that remain enjoined by the district court’s November 3, 2006 order. These include the relocation of some 90 units at Yosemite Lodge out of the Merced River floodplain, reduction in size of the Lodge footprint, relocation of part of Northside Drive to a location that will be more protective of the River, replacement of around 90 of the 353 campsites that were lost in the 1997 flood, including campsites accessible to handicapped visitors, needed improvements to parking and transit facilities, and construction of a footbridge for hikers at Happy Isles in order to prevent ongoing trampling of a riverbank and protect pedestrian safety. ER 1174-1192. In addition, the stay only applies to certain aspects of the utility improvement program. ER 1228-29. Hence, a significant number of needed improvements to the Park’s facilities are being delayed as a result of the district court’s injunction.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment "de novo, viewing the case from the same position as the district court." Alaska Center For Environment v. U.S. Forest Service, 189 F.3d 851, 857 (9th Cir.1999), citing Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995).

Review of agency action under the WSRA is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 701 et seq, and under the APA, a decision may be set aside only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Yosemite I, 348 F.3d at 793; see also Hells Canyon Alliance v. U.S. Forest Service, 227 F.3d 1170, 1176-1177 (9th Cir. 2000). As for claims under NEPA, the Court in Yosemite I explained the standard as follows (348 F.3d at 800, n.2):

We apply a "rule of reason" standard to review the adequacy of an agency's EIS, asking "whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001), cert. denied, 537 U.S. 822 (2002). This standard involves "a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation," id. (quoting California v. Block, 690 F.2d 753, 761 (9th Cir. 1982)), and is essentially the same as review for abuse of discretion. See Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998).

SUMMARY OF ARGUMENT

1. The 2005 Revised CMP remedied the deficiency this Court found in the user capacity element of the 2000 CMP by developing actual measures of user capacities and providing for specific management actions to occur should desired conditions not be maintained. The district court erred in finding that the Revised CMP lacked specific measurable limits on use. Such limits can be found in the new VERP indicators and standards, in the Wilderness Trailhead Quotas, the Superintendent's Compendium limits, and in the interim limits on facility capacity imposed by the User Capacity Management Program.

The district court's ruling was based on the legally incorrect view that WSRA does not permit reliance on a "reactive" program oriented around the monitoring of indicators, such as VERP. That ruling is directly contrary to this Court's holding in Yosemite I that NPS could address user capacities "by monitoring and maintaining environmental and experiential criteria under the VERP framework." 348 F.3d at 796. The district court also erred by condemning VERP as adopted in the Revised CMP because it allegedly "is not oriented towards preventing degradation." The district court failed to recognize that the indicators and standards in VERP are set so that management action will be triggered before there is degradation.

The district court's condemnation of VERP for not being a "permanent" response to the user capacity issue is also in error. The WSRA does not require

that agencies address user capacities by adopting one “permanent” solution. In any event, there is nothing “tentative” about NPS’s commitment to VERP; that system will be NPS’s primary mechanism for dealing with user capacity issues in Yosemite for the foreseeable future.

As suggested by this Court in Yosemite I, NPS has also adopted “interim” limits to complement VERP while it is being implemented. It was not arbitrary or capricious for NPS to base these interim limits largely on the existing capacity of facilities, where those capacities are largely below what existed in the Park when the Merced River was added to the National Wild and Scenic River System, and where visitor facilities such as campgrounds and lodgings are not inconsistent with the Merced’s status as a Wild and Scenic River.

2. The district court also erred by holding that the 2005 Revised CMP had to be set aside because it was not presented to the public as a “wholly self-contained” plan that “contains all management decisions and environmental analyses,” 439 F. Supp. 2d at 1092, instead of as a Revised Plan that focused on the particular deficiencies that this Court found in Yosemite I. This Court specifically instructed that NPS could proceed by producing a “revised” plan rather than starting from scratch. The fact that Yosemite II clarified that there was no valid CMP in place in 2004 for purposes of determining whether particular projects should be enjoined did not suggest that NPS could not rely on portions of the 2000 CMP that had withstood review. The NPS appropriately focused its analysis in the

2005 Revised CMP on the particular deficiencies found by this Court. The district court's insistence that NPS instead produce a "wholly self-contained plan" containing all decisions and analysis on WSRA issues receives no support from the WSRA itself, and is contrary to basic principles of judicial review.

3. The district court erred by finding that presentation of the "no-action" alternative in the SEIS was improper. The SEIS appropriately presented a no-action alternative consisting of the existing management direction for the Merced River corridor without the changes that this Court had instructed must be made in VERP and the El Portal boundaries. Existing management included provisions of the 2000 CMP, such as management zones and river protection overlay, that had been upheld in earlier litigation, and which were in force at the time of drafting the SEIS. For NPS to have closed its eyes to these applicable provisions in presenting a no-action alternative would have defied common sense and contravened the Council on Environmental Quality's (CEQ's) guidance on the appropriate no-action alternative for management plans.

Similarly, there was no basis for the district court's ruling against the discussion of action alternatives in the SEIS. The three action alternatives appropriately included, as one element, the revised version of VERP which included actual, measurable indicators and standards. Two of the action alternatives included, in addition to VERP, different maximum daily limits on numbers of persons allowed in particular areas, as well as annual limits on

visitation. The district court struck down this discussion of alternatives simply because it relied on VERP, which the district court found to be impermissibly “reactive” and insufficiently “permanent.” But the district court’s reasons for condemning VERP are plainly contrary to this Court’s rulings in Yosemite I. Accordingly, there was no basis for overturning the choice of action alternatives, simply because they had relied on VERP as one elements of a user capacity program.

ARGUMENT

I

CONSISTENT WITH THIS COURT’S DIRECTION, THE 2005 REVISED CMP CONTAINS SPECIFIC MEASURABLE LIMITS ON USE, AND FULLY COMPLIES WITH THE WSRA REQUIREMENT THAT A PLAN “ADDRESS USER CAPACITIES”

The district court committed several serious errors in the course of finding that the 2005 Revised CMP failed to comply with the WSRA requirement to “address user capacities,” as that requirement was interpreted by this Court in Yosemite I. As this Court recognized, the statute does not define or otherwise explain the key phrase directing that a comprehensive plan must “address * * * user capacities.” 348 F.3d at 796. This Court found that the plain meaning of the phrase was that “the CMP must deal with or discuss the maximum number of people that can be received” at a Wild and Scenic Rivers segment. Id. The Court examined the 1982 WSRA Interagency Guidelines promulgated by the Secretaries of Interior and Agriculture and deferred to those Secretarial Guidelines as “an

exercise of the administering agencies' authority to resolve ambiguities in the statute they administer.” Id. at 797. The Court pointed out that “[a]lthough these references [in the Guidelines] to setting limits on the amount or quantity of public use clarify that the WSRA obliges the administering agency to provide actual limits in its CMP, the Secretarial Guidelines do not specify that this obligation can be satisfied only by capping the number of visitors.” 348 F.3d at 797. The Court also explained that “[t]his does not mean that the NPS is precluded from using the VERP to fulfill the user capacities requirement” so long as it is “implemented through the adoption of quantitative measures sufficient to ensure its effectiveness as a current measure of user capacities.” 348 F.3d at 797. The Court concluded that NPS had discretion in determining how to develop an “actual measure of user capacities;” this could be done “by setting limits on the specific number of visitors, by monitoring and maintaining environmental and experiential criteria under the VERP framework, or through some other method.” 348 F.3d at 796.

The 2005 Revised CMP remedied the specific deficiency this Court found in the user capacity element of the 2000 CMP, by adopting actual limits on use under VERP. These actual measures are summarized in Table II-5 of the Revised CMP. ER 249-256. This Table sets out specific indicators and standards for each of the 12 management zones, and describes the types of management actions that can be taken when standards are declining. For instance, to protect the ORVs associated with Wilderness character (solitude) the Wilderness “untrailed travel” zone applies

to much of the Merced River and its tributaries upstream of Yosemite Valley. The relevant “indicator” for this zone is the number of encounters with other parties, and the standard is “[n]o more than one encounter with another party per day 80% of the time.” ER 249. Management actions that can be taken if this standard is exceeded are to reduce wilderness trailhead quotas, remove social trails, increase education about other areas to visit, increase education regarding conditions and need for dispersing use, close some areas temporarily or permanently, increase enforcement of permit requirements, and require fixed itineraries for wilderness permits. Id.

Similarly, to protect the Biological and Recreational ORVs within the Heavy Use Trail Zone (applicable to the popular hiking area known as the Little Yosemite Valley), there are three different indicators: wildlife exposures to human food, actual number of people recreating, and people at one time at selected sites. Each indicator has a standard and examples of possible management actions. For instance, the standard for “people at one time at selected sites” is “not more than 20 people on a 50-meter section of the trail at any one time 80% of the time,” which will be “[s]ampled mid-week, weekends, holiday weekends, and weeks following holidays during peak periods.” ER 249. Possible management actions where the standards are exceeded include requiring permits for day use hikers, allowing only ranger-led tours for day use, reducing infrastructure, closing some areas and limiting overall numbers of users through entrance station quotas. Id.

Appropriate indicators and standards are similarly listed for the other zones, and cover such diverse activities as camping, wildlife interaction, hiking, non-motorized personal water craft, fishing, picnicking, and parking. ER 249-256. This use of actual indicators and standards, rather than “mere examples” as in the 2000 CMP, complies with this Court’s instruction that NPS could use VERP as long as VERP yielded “actual measure[s] of user capacity.” 348 F.3d at 796. Yet, the district court struck down the NPS’s carefully-crafted response to Yosemite I, for reasons that cannot be reconciled with that opinion or with the WSRA itself.

A. The District Court Erred By Finding That the 2005 Revised CMP Does Not Include Specific Measurable Limits on Use And is Not Oriented Towards Preventing Degradation. – The district court’s judgment appears to be primarily based on its finding that “the VERP program, the primary user capacity program in the 2005 Revised Plan, does not contain such specific measurable limits on use, and so is not oriented towards preventing degradation.” 439 F. Supp. 2d at 1100. This finding is simply wrong. It ignores the specific measurable limits on use that are contained both in the VERP framework itself and in other components of the User Capacity Program found in the Revised CMP. The VERP indicators and standards contain limits that are both specific and measurable. See discussion supra at 9-12 and 24-26. Some of these limits are based on actual numbers of people, for instance, the indicator and standard governing “[a]ctual number of people recreating within the River Protection Overlay” in Little

Yosemite Valley. ER 249. Most limits are based on environmental and experiential criteria, rather than counting people, as this Court stated was permitted under the WSRA. 348 F.3d at 796. For instance, water quality is measured and protected by an anti-degradation standard for each segment of the River, and an “absolute minimum” standard of “meeting state fecal coliform standard for recreational contact at all times.” ER 251. Sensitive vegetation is measured and protected by a standard that requires “no net increase in number from 2004 baseline of social trails, measured on an annual basis,” and no social trails at all are allowed for wetland features. Id. Such actual measurable limits, as well as the ORV’s they are meant to protect, are found throughout the indicators and standards in the CMP. ER 249-256.

Specific measurable limits on use are also included in the other elements of the User Capacity Plan, namely the Wilderness Trailhead Quotas, the Superintendent’s Compendium limits, and the interim limits on facility capacity. See supra at 10-12. The district court’s failure to recognize the existence of these actual measurable limits is reversible error.

A second problem with the district court’s ruling is that it erroneously assumes that NPS can never rely on a system that depends on monitoring environmental and experiential criteria because such a system is “reactive.” The district court stated:

As Plaintiffs repeatedly and correctly argue, the VERP program in the 2005 Revised Plan is reactive. Defendants

consistently sidestep the fact that without a user capacity program that states an actual level of visitor use that will not adversely impact ORVs, the VERP program is a reactionary tool to try to stop degradation that has already occurred. The requirement for specific measurable limits on use is to prevent degradation, not to respond after it has happened. The court finds that the VERP program, the primary user capacity program in the 2005 Revised Plan, does not contain such specific measurable limits on use, and so is not oriented towards preventing degradation.

439 F. Supp. 2d at 1100.

The district court's condemnation of VERP as "reactive" and "not oriented towards preventing degradation" betrays a fundamental misunderstanding of this Court's judgment in Yosemite I and of the 2005 Revised CMP. Yosemite I established that NPS could address user capacities "by setting limits on the specific number of visitors, by monitoring and maintaining environmental and experiential criteria under the VERP framework, or through some other method." 348 F.3d at 796 (emphasis added). In developing the Revised CMP, the NPS took a hard look at options for addressing user capacities including options which involved caps on visitor numbers. See, e.g., ER 215 ("it is possible to limit the number of people in the river corridor, in each river segment, or in each management zone," and "these limits can be expressed as the number of people in 1 year, the number of people over 24 hours, or the number of people at any one time"). The SEIS studied in depth two alternatives (alternatives 3 and 4) that included specific limits on user numbers. See supra at 12-13, ER 290-308. NPS concluded that using strict numerical limits as its major tool for addressing user capacity issues was not an

effective strategy in the context of Yosemite National Park. As the SEIS points out, “[r]esearch on visitor use impacts on resources indicates that there is no direct correlation between use levels and the intensity of impacts on resources (Graefe 1990, Marion 2000);” moreover, “[t]he impact from use results not just from the number of users, but from the types of uses, the dispersion of users, the season of use, the resource values in the area and the management framework, including the facilities provided (Marion 1998, Cole et al 2005).” ER 213. Accordingly, NPS reasonably chose to implement an option that monitors and maintains environmental and experiential criteria, as permitted by this Court in Yosemite I, rather than relying primarily on fixed numerical user limits.

The district court did not find that NPS’s evaluation of the options permitted by this Court’s opinion in Yosemite I was arbitrary or capricious. It simply condemned VERP as “reactive.” That ruling effectively requires NPS to set specific limits on the number of visitors, even though this Court clearly stated that NPS did not need to adopt that method of addressing user capacity issues. 348 F.3d at 797 (“the Secretarial Guidelines do not specify that this obligation can be satisfied only by capping the number of visitors”). The district court’s judgment cannot be reconciled with Yosemite I.

The district court also erred by condemning VERP as adopted in the Revised CMP on the ground that it “is not oriented towards preventing degradation.” The district court failed to understand that the “environmental and

experiential criteria,” which are referred to as “indicators” and “standards” in VERP, are set so management action will be taken before there is degradation of ORVs. The district court wrongly assumed that exceeding a particular standard would necessarily mean that there would be degradation of ORVs. On the contrary, indicators and standards are set conservatively so that degradation will not occur. The Revised CMP explains that (ER 239):

Indicators, which are measurable variables, are determined first; standards quantifiably define the acceptable conditions (i.e., measured values) for each indicator. These acceptable conditions are set at a level that will protect and enhance the Merced River’s Outstandingly Remarkable Values.

NPS does not choose a particular “indicator” unless that indicator is “[a]ble to provide an early warning for resource degradation.” ER 241. Contrary to the district court’s assumption, the violation of a standard does not indicate degradation of ORV’s, because the standards are set up to be triggered before degradation occurs.

Moreover, management actions pursuant to VERP need not await violation of a standard:

The process of monitoring and its relationship to management actions can be likened to a traffic signal (figure II-6). A green-light condition occurs when monitoring shows that conditions are well within standards and no additional management actions are required. A yellow-light condition occurs when monitoring shows that conditions are approaching the standard. This early warning sign may call for implementing proactive management actions to protect and enhance the Outstandingly Remarkable Values. Measures taken at yellow-light conditions, when standards are still being

met, may be less restrictive and focus on approaches such as public education.

ER 242 (emphasis added). Thus, the district court plainly erred in finding that VERP only contemplates management action after degradation to ORVs has occurred.

Furthermore, the district court's assumption that VERP will permit degradation cannot be reconciled with this Court's guidance in Yosemite I. This Court there recognized that "[t]o maintain 'desired conditions,' the VERP framework provided for 'selecting and monitoring indicators and standards that reflect these desired conditions, and taking management action when the desired conditions are not being realized.'" 348 F.2d at 796, quoting from 2000 CMP (emphasis added). This Court never suggested that VERP's trigger for management actions – desired conditions not being realized – was somehow equivalent to degradation contrary to the WSRA. The only problem in the VERP framework was that the 2000 CMP provided examples instead of actual indicators and standards. Now that this deficiency has been remedied, VERP should not be overturned based on an assumption – that the triggers for management action necessarily permit degradation contrary to WSRA – that is clearly contrary to this Court's guidance in Yosemite I.

B. VERP is Not Improperly "Temporary" or "Uncertain." – Having condemned VERP as improperly "reactive," the district went on to criticize the fact that, in its view, VERP was not adequately "permanent." The court stated that:

What NPS has created in the VERP portion of the user capacity program in the 2005 Revised Plan is a tentative plan of uncertain duration which adopts temporary limits, which will apply for an unknown length of time.

439 F. Supp. 2d at 1100; see also *id.* at 1098 (“[r]emarkably, NPS makes no commitment to the use of the VERP program after five years”); *id.* at 1099 (“there is no indication when, if ever, NPS will finally adopt a permanent primary method for addressing user capacity, a required component for a comprehensive management plan under WSRA”).

These criticisms misunderstand both the WSRA requirement and the way NPS has responded to that requirement. To begin, nothing in the WSRA’s requirement that CMPs “address user capacities” suggests that a land management agency must address this issue by adopting a “permanent” response. The language of the statute leaves discretion for an agency to update or change its method of addressing user capacity issues based on new evidence. That agencies have this degree of discretion is implicit in this Court’s recognition that the statute leaves the choice of a particular method to address user capacities up to the agency.

Yosemite I, 348 F.3d at 796. The district court’s seeming requirement that the agency adopt one “permanent” method of addressing user capacity would foreclose the agency’s ability to update CMP’s based on new scientific evidence regarding the best methods for dealing with user capacity. See ER 212-213 (documenting research trends on user capacity). Congress never intended such a rigid approach.

While there is no statutory requirement for a “permanent” user capacity method, NPS nevertheless chose to adopt VERP as its primary method for dealing with user capacity issues for the foreseeable future. The district court seemed concerned that VERP indicators and standards may change over time, but such change is inherent in any adaptive management approach. See ER 219 n.6. VERP is “an on-going process” that “continually improves and adjusts the program based on the knowledge gained over time,” as well as “regularly reports results to the public.” ER 169. But this does not mean that VERP is “tentative,” or that NPS is not committed to VERP as the best available solution for dealing with user capacity issues at the Park. See, *e.g.*, ER 286 (“in the long term, use of existing user capacity methods and the VERP program will allow the park to protect and enhance the Outstandingly Remarkable Values of the Merced River”).^{7/}

The district court may have confused VERP with the interim limits, which are explicitly temporary. Because the VERP indicators and standards must be

^{7/} The district court did not cite to the administrative record to support its findings about VERP being “tentative,” but instead noted a statement in Defendants’ Response to Plaintiffs’ Concise Statement of Facts at page 15. There, in response to one of plaintiffs’ statements about the alternatives studied in the SEIS, defendants simply noted that “VERP is an element of the action alternatives, but does not ‘govern’ the alternatives; whether VERP will become permanent after 5 years is not known at this time.” ER 1098. This response, in context, plainly did not indicate that NPS was not committed to VERP, only that the government could not say for certain that VERP would become “permanent.” In any event, the answer to the status of VERP should have been sought in the record, which shows that NPS has adopted VERP not as a temporary fix but as its primary tool for addressing user capacity over the long term. ER 239-244.

thoroughly field tested, NPS chose to implement specific interim limits, independent of the VERP process, for the period (approximately 5 years) of initial VERP implementation. ER 281, 695. This followed from this Court’s suggestion in Yosemite I that “[i]f the NPS is correct in projecting that it will need five years to fully implement the VERP, it may be able to comply with the user capacity mandate in the interim by implementing preliminary or temporary limits of some kind.” 348 F.3d at 797. The interim limits adopted by NPS apply to things like overnight accommodations, day use parking, bus parking, and employee housing. ER 281-283. The SEIS explains that interim limits could be dropped, but only after monitoring established that the VERP indicators and standards had been field tested and verified. ER 592, 695.

In contrast to the interim limits, VERP itself is never characterized in the Revised CMP or SEIS as “interim” or “temporary.” It is clear from the record that NPS is committed to VERP in the foreseeable future. This is a rational response to the WSRA requirement, and should be upheld notwithstanding the district court’s unwarranted attacks.

C. Using Existing Capacity Limits as a Basis For Interim Limits Was Appropriate and Protective of ORVs. – As noted, this Court stated that NPS could use VERP as its principal user capacity tool, and that “[i]f the NPS * * * will need five years to fully implement the VERP, it may be able to comply with the user capacity mandate in the interim by implementing preliminary or temporary

limits of some kind.” Yosemite I, 348 F.3d at 797. The 2005 Revised CMP followed this approach. It adopted interim limits, including limits on overnight lodging, camping spaces, day-visitor parking and bus parking spaces, and employee housing units. ER 281-283. Most interim limits are well below the facility levels that existed in 1980, before the river was designated under the WSRA. ER 285, Table III-6. In Yosemite Valley, there are now approximately 300 fewer parking spaces, 250 fewer lodging rooms, and 250 fewer campsites than there were in 1980. Id. If the status of the Merced River’s ORVs was sufficient for eligibility in 1987 when Yosemite Valley had more parking spaces, rooms and campsites than at present, it would be improper to simply assume that the lower facility levels permitted under the 2005 CMP will “degrade” the ORVs.

The SEIS concludes that the selected alternative will protect and enhance ORVs. ER 569-574. Further evidence that ORV conditions are being protected appears in the VERP Monitoring Reports NPS has released to date. ER 998, 1077. Plaintiffs produced no contrary evidence showing degradation of ORVs.

Ignoring the record evidence, the district court rejected the interim limits simply because many of them had been in place at the time of this Court’s ruling in Yosemite I and because many are based on the capacity of existing facilities. 439 F. Supp. 2d at 1099-1100. There is no hint in Yosemite I that appropriate interim limits could not be derived from limits that had been implemented under the NPS’s other statutory authorities. This Court found only that the 2000 CMP “is deficient

in its approach to user capacities because its principal method for addressing user capacities, the VERP framework, contains only sample standards and indicators.” 348 F.3d at 796. The Court had no occasion to address whether existing facility limits could form the basis for interim limitations complementing a VERP program that did contain actual measures rather than just samples.

Nor is there anything in the WSRA that precludes basing user capacity limits on the current capacity of facilities. This Court has made clear that the WSRA permits a balancing of recreational use and preservation, and that reviewing courts must defer to the judgments of the land management agency in striking that balance. In Hells Canyon Alliance v. U.S. Forest Service, 227 F.3d 1170 (9th Cir. 2000), this Court considered a challenge to the Forest Service’s decision to permit a certain level of public motor boat use on an area of the Snake River protected by the WSRA.

Although the Council has identified several examples from the FEIS raising the specter of interference with the values for which the Snake River was included in the wild and scenic river system, it has not shown that the agency’s limitations on motorized use are arbitrary and capricious, or even that the extent to which the agency allows motorized use of the river in fact substantially interferes with the river’s outstandingly remarkable values.

227 F.3d at 1178. This Court found that “the mere existence of some decline in scenic value does not establish that motorized use substantially interferes with this value.” Id. at 1178. The Court made clear that the mere fact of such an impact did not show that, “the agency’s chosen limitations in striking a balance between the

recreation value - which expressly recognizes the legitimacy of motorized boating - and the scenic value are arbitrary and capricious or fail to protect and enhance the river's value.” Id. Hells Canyon Alliance makes clear that WSRA permits a balancing of interests, including the interests of visitors who wish to access Yosemite Valley by motor vehicle and stay overnight.

As in Hells Canyon Alliance, Congress here understood that the Merced River was enjoyed by a variety of users, and that Yosemite Valley had extensive existing facilities for accommodating visitors. When Congress included the Merced River in the national wild and scenic rivers system in 1987, it recognized that the river was extensively used for recreational pursuits. See S. Rep. No. 96, 100th Cong., 1st Sess. 2 (1987) (characterizing the mainstem Merced as offering “excellent fishing for its entire length, spectacular scenery in the more wide reaches, and an outstanding and heavily used recreation resource in the areas of easy accessibility”). Hence, the “values which caused [the Merced] to be included in said system,” 16 U.S.C. 1281(a), include the Merced’s value as an extremely popular recreation resource, which indicates that extensive public use and facilities necessary to support that use cannot by themselves be assumed to conflict with the values that caused the River to be added to the system.

The WSRA also makes clear that, “[e]ach component of the national wild and scenic rivers system shall be administered in such a manner as to protect and enhance the values which caused it to be included in said system without, insofar

as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.” 16 U.S.C. 1281(a) (emphasis added). WSRA defines a “recreational” river segment as one that is “readily accessible by road or railroad, that may have some development along [its] shorelines, and that may have undergone some impoundment or diversion in the past.” A “scenic” segment is one that is “free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by road.” 16 U.S.C. 1274(b). All of these provisions show that roads, developments, and similar facilities for visitors are not inherently inconsistent with the values that Congress seeks to protect when it adds segments to the Wild and Scenic Rivers system.

In sum, NPS’s determination to adopt interim limits on facility capacity that are generally lower than when the River was designated is consistent with the statute. Moreover, the record strongly supports a finding that such limits, as part of NPS’s comprehensive User Management Plan, protect ORVs. See ER 569-574. The district court’s rejection of the interim limits was error.^{8/}

^{8/} Equally misguided is the district court’s criticism of a clarification made in the Record of Decision for the 2005 Revised CMP, where NPS pointed out that the interim facility limits would not necessarily restrict changes in facilities to the current facility footprint. See 439 F. Supp. 2d at 1099 and ER 798. The clarification was simply intended to cover initiatives like the Yosemite Lodge project, where the NPS wishes to relocate some 90 units out of the Merced River floodplain to a less ecologically sensitive upland area. The replacement units will
(continued...)

In sum, the district court's holdings on user capacity issues conflict with this Court's opinion in Yosemite I, are unsupported by the record, and threaten the very basis of NPS's efforts to deal with capacity issues by using an adaptive management approach rather than numerical limits on visitors. They should be reversed.

II

THE DISTRICT COURT ERRED BY RULING AGAINST THE REVISED CMP ON THE GROUND THAT IT WAS PRESENTED AS A REVISION TO THE 2000 CMP, INSTEAD OF AS A WHOLLY SELF-CONTAINED PLAN

The district court incorrectly held that the 2005 Revised CMP had to be set aside because it was not presented to the public as a “wholly self-contained” plan that “contains all management decisions and environmental analyses.” 439 F.

^{8/}(...continued)

not be restricted to the current facility footprint, thereby permitting a reduction in the overall footprint of the Lodge buildings and facilities and allowing for ecological restoration of approximately 37 acres within in the current Lodge area. ER 1185-1187. The overall effect will be environmentally positive, and there will not be any significant change in the number of lodging units available. The district court seems to have overlooked that any construction in the River corridor, whether it is inside or outside the current facility footprint, will have to comply with all CMP elements, including zoning, ORV protection, the river protection overlay, and river classification elements.

Supp. 2d at 1092. The court stated that, “because the Ninth Circuit found the 2000 MRP to be invalid, the 2005 Revised Plan cannot logically refer to it and rely on it, as a separate, existing entity, to create a ‘new or revised’ plan.” Id. at 1093. “This court finds that language from the Ninth Circuit indicates an intention that a single document be produced, covering everything.” Id. This ruling is inconsistent with Yosemite I and Yosemite II, violates established principles of judicial review of agency action, and has no basis in the WSRA.

A. This Court Specifically Permitted a “Revised” CMP. – In Yosemite I, this Court was careful to make clear that, of the seven elements of the 2000 CMP, it found deficiencies only in two, and that the deficiencies it found did not infect other aspects of NPS’s compliance with the statute. Thus, while the Court found error in the use of “examples” for indicators and standards, it stressed that use of VERP to comply with the requirement for addressing user capacities was not precluded. 348 F.3d at 797. Similarly, the Court struck down the delineation of boundaries only with respect to four of the 81 miles of the River covered by the CMP. The Court said nothing to indicate that these two discrete errors somehow undercut the analysis in the rest of 2000 CMP.

Moreover, this Court specifically rejected plaintiffs’ challenge to the adequacy of the data supporting the various determinations in the CMP. In this connection, this Court had reason to review all elements of the CMP, and clearly did so. See, e.g., 348 F.3d at 795 (discussing the RPO and Management Zoning

elements of the CMP). This Court nowhere suggested that its finding that the examples of indicators and standards were insufficient in any way undercut the validity of the Management Zones or other elements that were upheld against plaintiffs' challenges. If this Court had intended NPS on remand to reconsider these other elements, it presumably would have said as much, but nothing in the Court's discussion suggests that such reconsideration would be required.

If there were any doubt about this question, it would be resolved by the clear instruction in this Court's conclusion. The ordering paragraph in Yosemite I states that "[w]e remand for the district court to enter an appropriate order requiring the NPS to remedy these deficiencies in the CMP in a timely manner." Id. at 803 (emphasis added). "These deficiencies" were: 1) the failure to include "actual" limits in VERP, and 2) the failure to properly delineate the boundaries at El Portal.

The district court relied on the fact that this Court in Yosemite II clarified that the 2000 CMP was "invalid" until NPS cured the deficiencies identified by the Court. The district court misunderstood this ruling. The fact that there were two specific deficiencies in the 2000 CMP meant that NPS had not succeeded in producing a valid CMP that could justify moving ahead with projects in the River Corridor such as those challenged by plaintiffs' injunction motion. But saying that there is no valid CMP in place until the deficiencies are repaired is not the same thing as saying that the non-deficient elements of the 2000 CMP cannot be relied upon as components of a revised CMP that cures the deficiencies. The 2000 CMP

protected the Merced River corridor in a number of significant ways: by setting the maximum allowable corridor boundaries for all but four miles of the mainstem Merced River and all of the South Fork, by assigning appropriately protective classifications to each river segment, by defining ORVs for each segment, by developing management zones to protect and enhance natural and cultural resources and the defined ORVs, and by adopting the RPO to ensure that the river channel and areas immediately adjacent to the river are protected at a high standard. ER 193-202. Nothing in either of this Court’s opinions indicates that these protections were nullified by its ruling. It would have been contrary to the WSRA goal of protecting the river corridor to find that NPS was barred from relying upon these protective measures.

This Court in Yosemite II was concerned only with the question of injunctive relief during the remand, and in particular the district court’s willingness to allow projects to go forward based on an apparent belief that there was a valid CMP in place. Yosemite II explained that the fact that it found two deficiencies meant that there was no valid CMP in place, and it directed the district court to reconsider the question of injunctive relief with that clarification in mind. 366 F.3d at 731. At the same time, this Court stated that “[p]ursuant to our original Opinion, the National Park Service (“NPS”) must prepare a new or revised CMP that adequately addresses user capacities and properly draws the river boundaries at El Portal.” Id. (emphasis added). If the Court had intended to instruct the

Service to prepare a new self-contained CMP that did not rely on the 2000 CMP it would not have provided the option of preparing a “revised” CMP. The fact that this Court allowed the option of a “revised” CMP confirms that NPS did not err by focusing its efforts on remand on the two problem areas, rather than redoing the entire CMP.

B. The WSRA Does Not Require That a CMP be “Wholly Self-Contained” in a Single Document. – Nothing in the WSRA bars NPS from proceeding as it did here. Plaintiffs claimed, and the district court apparently accepted (see 439 F. Supp. 2d at 1091), that use of the word “comprehensive” in 16 U.S.C. 1274(d) implies that the plan required by that provision must be one single, self-contained document. But “comprehensive” in the context of Section 1274(d) clearly refers to the Plan’s subject matter, not its format. In any event, “comprehensive” is not a synonym for “self-contained.” See, e.g., Random House Dictionary of the English Language 420 (1987) (defining “comprehensive” as meaning “of large scope; covering or involving much; inclusive,” and whose synonyms are, “broad, wide, extensive, [and] full”). Moreover, Section 1274(d) provides that the plan “may be incorporated into resource management planning for affected adjacent Federal lands.” This indicates that a CMP can be incorporated into planning documents for adjacent federal lands, which again shows that Congress did not expect that all CMPs be presented as single, self-contained documents. The statute leaves format issues to the federal agency.

C. NPS Acted Rationally in Focusing Primarily on the Two Deficiencies

Found by this Court. – The 2005 Revised CMP contains a reasonable amount of detail regarding other elements of the CMP besides user capacities and the El Portal boundaries. It includes a full description of ORVs , river classifications, management zones and the RPO. ER 225-238.^{9/} The Revised CMP appropriately refers the reader to the 2000 CMP for additional detail on matters such as management zones and prescriptions. ER 239. Proceeding in this fashion permitted NPS and the public to focus primary attention on the particular deficiencies identified by this Court, without having to sort through large amounts of material on subjects that were no longer in contention.^{10/}

The district court’s holding that the 2005 Revised CMP could not rely on elements of the 2000 CMP that had been upheld, and that NPS should have

^{9/} As noted supra at 9, n.3, following completion of the NEPA process, NPS prepared a single-volume “presentation plan” version of the Revised MRP entitled “Merced Wild and Scenic River Revised Comprehensive Management Plan.” ER 826-996 (excerpt). To the extent that there is any “single document” requirement inherent in the WSRA, this presentation plan satisfied it.

^{10/} Incorporating by reference is generally encouraged in environmental law, as a way to permit focus on the particular issues that need to be decided and to avoid the waste of time and resources that comes from pointless republication. The Council on Environmental Quality (CEQ) regulations implementing NEPA direct agencies to eliminate unnecessary content in an EIS. “Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described.” 40 C.F.R. § 1502.21.

produced a “wholly self-contained Plan” is not only in conflict with this Court’s earlier rulings and with the language of the WSRA, but also fundamentally conflicts with principles of judicial review. The Supreme Court has made clear that “the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.” FPC v. Idaho Power Co., 344 U.S. 17, 20 (1952); accord, NLRB v. Food Store Employees, 417 U.S. 1, 9-10 (1974); South Prairie Constr. Co. v. Local No. 627, Operating Engineers, 425 U.S. 800, 805-806 (1976); Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 558 (9th Cir. 1989); Public Utility District No. 1 v. Federal Power Com’n, 242 F.2d 672, 683 (9th Cir. 1957). As this authority indicates, once this Court had “laid bare” the two errors in the 2000 CMP, its reviewing function was complete, and it was without power to instruct the agency exactly how to go about revising the CMP on remand so as to cure the deficiencies. In light of this principle, it plainly would be improper to assume that this Court, sub silentio, constrained NPS’s discretion on remand to rely on portions of the 2000 CMP that had withstood judicial review.

Consistent with this review principle, this Court commonly accepts supplemental documents that address only the deficiencies found by courts in earlier litigation. Thus, for instance, in Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1063-1064 (9th Cir. 2002), this Court accepted a supplemental EIS whose scope was restricted to curing the three particular

deficiencies this Court had found in an earlier round of litigation, without any hint that proceeding in this way was improper. Similarly, in Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797 (9th Cir. 2005), this Court stressed that a Forest Plan revision and accompanying supplemental EIS had been prepared to address a particular deficiency found by the district court in the original Forest Plan revision and EIS – its failure to consider new wilderness options. The Court accepted this limited focus as proper, and rejected an argument that the revised plan and the SEIS actually had a broader scope that included more than just the wilderness issue. 421 F.3d at 804-05. The district court’s refusal in this case to permit to Park Service to produce a revised Plan and SEIS that focused on the specific deficiencies found by this Court conflicts with this Court’s prior cases.

The Supreme Court has also made clear that “[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978) (internal quotation marks omitted). As shown, supra at 43-44, the WSRA permits the agency to determine such procedural matters as whether to re-publish an entire CMP when the agency is making revisions to discrete parts of the CMP. The district court clearly stepped beyond its proper role by insisting that NPS use the court’s preferred format of issuing a wholly self-contained document.

III

THE DISTRICT COURT ERRED BY INVALIDATING THE SEIS

All of plaintiffs' NEPA claims against the EIS prepared for the 2000 CMP were rejected in the last round of this litigation. See Friends of Yosemite Valley v. Norton, 194 F. Supp. 2d 1066, 1118-19 (E.D. Cal. 2002), and Yosemite I, 348 F.3d at 803. In remanding the 2000 CMP for correction of two deficiencies, this Court did not mention any need to prepare a supplemental EIS, but instead simply instructed the district court "to enter an appropriate order requiring the NPS to remedy these deficiencies in the CMP in a timely manner." 348 F.3d at 803. Similarly, this Court's order in Yosemite II simply stated that, "[p]ursuant to our original Opinion, the National Park Service ("NPS") must prepare a new or revised CMP that adequately addresses user capacities and properly draws the river boundaries at El Portal." 366 F.3d 731.

The district court nevertheless required NPS to prepare an SEIS along with the revised CMP. The new SEIS is lengthy and detailed. Its focus, as with any "supplemental" EIS, is on the particular subject matter not already covered by the original EIS. In this case, that additional subject matter is the two elements of the 2000 CMP that were found deficient by this Court. See ER 189.

Consistent with this focus, the SEIS analyzed a no-action alternative that represented conditions as of October 2003, when this Court issued its ruling finding that the VERP and El Portal boundary elements of the 2000 CMP were

deficient. ER 268. The no-action alternative thus included all management direction that applied to the Merced River corridor at that time that had not been overturned by this Court's ruling. Hence, applicable protections stemming from the WSRA, such as ORVs, management zones, and RPO, were considered to be part of the status quo, since they had not been overturned.

Using existing management direction as a baseline, the SEIS was then able to analyze a "preferred alternative" that included a comprehensive user capacity program utilizing a VERP element that contained actual indicators and standards, as well as an expanded boundary for the El Portal segment. ER 276. It then considered two other "action alternatives" that incorporated VERP, presented different boundary configurations for El Portal, and included different ways to cap the number of visitors in various portions of the river corridor. See supra at 12-13.

A. The No-Action Alternative Was Sufficient. – The district court erroneously held that the "no action" alternative in the SEIS was defective because it treated as part of the status quo those aspects of the 2000 CMP that had been upheld in the earlier round of litigation. The district court stated that "because the Ninth Circuit held the 2000 MRP to be illegal, NPS cannot properly include elements from that plan in the no action alternative as the status quo." 439 F. Supp. 2d at 1105. Thus, the district court would require NPS to engage in the highly artificial exercise of constructing a "no-action" alternative that does not include any element of the 2000 CMP.

As discussed supra at 40-43, the district court misunderstood this Court’s ruling in Yosemite II. This Court did not void elements of the 2000 CMP such as management zones and the River Protection Overlay, and indeed rejected challenges to those elements. 348 F.3d at 800-801. The Court in Yosemite II simply clarified that there was no valid CMP in place in 2004 when the district court was determining whether to enjoin projects that depended on the existence of a valid CMP. There is nothing in either of this Court’s earlier decisions suggesting that NPS could not rely on the upheld parts of the 2000 CMP for any purpose. The very fact that the district court required preparation of a “supplemental EIS” confirms that it was proper for NPS to focus on an analysis that supplemented the EIS done for the 2000 CMP, by studying alternative ways of curing the specific deficiencies found by this Court.

It was reasonable and consistent with NEPA for NPS to treat the management zones, ORV’s, boundaries, classifications, and other elements of the 2000 Revised CMP that were upheld in the earlier litigation as the status quo for purposes of defining a reasonable “no action” alternative in the 2005 SEIS. As this Court noted in upholding the EIS for the 2000 CMP, the CMP is a programmatic planning document that does not approve specific projects. Yosemite I, 348 F.3d at 801. CEQ has provided the following guidance regarding the “no action” alternative for planning documents like CMPs:

There are two distinct interpretations of “no action” that must be considered, depending on the nature of the proposal

being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases “no action” is “no change” from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise.

CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg. 18026, 18027 (1981) (emphasis added).

Here, consistent with CEQ’s guidance, the SEIS employed a “no action” alternative that involved no change from the existing management direction for the river corridor. The existing management direction consisted of the river boundaries, classifications, prescriptive management zones, RPO, and other elements of the 2000 CMP. The district court’s ruling would require NPS to ignore these existing elements of the management regime. That counter-factual exercise is contrary to the CEQ guidance, as well as common sense.

The district court’s analysis ignores that an agency’s choice of a particular “no action” alternative is reviewed under a deferential standard. See, e.g., Association of Public Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1188 (9th Cir. 1997) (accepting agency’s definition of status quo for purposes of no-action alternative); American Rivers v. F.E.R.C., 201 F.3d 1186, 1200-1201 (9th Cir. 2000) (describing difficulty of defining appropriate no-action alternative in situation of ongoing action and applying deferential standard in upholding NEPA alternative analysis). The district court improperly substituted its

view of the appropriate definition of the no action alternative for the view of the agency, and its ruling in this regard should be reversed.

B. The SEIS's Consideration of Action Alternatives Was Sufficient to Permit a Reasoned Choice. – The district court's other NEPA ruling – that the three action alternatives in the SEIS improperly incorporated VERP as an element of the action – is also erroneous. The district court held that since it had found “that the VERP program in the 2005 Revised Plan is inadequate to constitute the primary feature of a user capacity program as required by WSRA, this court must conclude that a EIS in which all alternatives are based on VERP program presents an inadequate range of alternatives under NEPA.” 439 F. Supp. 2d at 1107. As we show supra at 28-34, the district court's rulings that VERP as presented in the Revised CMP is improperly “reactive” and “tentative” are incorrect. Accordingly, the court's ruling that the action alternatives in the SEIS should not have relied on VERP must fail as well. This Court made clear that NPS could utilize VERP, so long as the revised plan contained actual rather than sample indicators and standards. As discussed supra at 23-27, the version of VERP adopted in the 2005 CMP contains actual limits, consistent with this Court's directive. Accordingly, it is consistent with NEPA to include the revised version of VERP in the action alternatives studied in the SEIS.

Moreover, Alternatives 3 and 4 in the SEIS presented a very different approach, including (in addition to VERP) maximum daily limits on numbers of

persons allowed in specific management zones, as well as annual limits on overall visitation within the river corridor. See ER 176-180. This was a reasonable approach, particularly because the two citizen groups behind this litigation have favored approaches that set such limits. In sum, the SEIS provided a reasonable range of alternatives for making the choice that was before the agency, which was how best to cure the deficiencies found by this Court in Yosemite I. The district court's ruling failed to give appropriate deference to the agency's structuring of its alternatives analysis. See Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853, 871 (9th Cir. 2004) (finding that district court's holding striking down alternatives analysis "fails to give Interior the discretion due agencies under NEPA").

The district court also criticized alternatives 3 and 4, which included some "caps" on the annual level of visitation, "because * * * these annual visitor limits could be altered if it is deemed appropriate by the NPS," and "[t]hus, as Plaintiffs argue, there is nothing permanent about these plans." 439 F. Supp. 2d at 1107. This criticism stemmed from the district court's erroneous belief that the WSRA requires that agencies can only address user capacities by the adoption of "permanent" measures. As discussed supra at 31-34, there is nothing in the statute, the Secretarial Guidelines, or the earlier holdings of this Court to support that view.

Finally, it is important to keep in mind that the EIS on the 2000 CMP had considered a wide variety of alternatives, and that plaintiffs' attack on that consideration was rejected in a holding that was not appealed. See Friends of Yosemite Valley v. Norton, 194 F. Supp. 2d at 1119-1120. In light of this history, it was logical for NPS to focus its attention in the SEIS on the particular defects found by this Court. The district court's ruling that NPS must essentially start from scratch improperly permits plaintiffs to revive claims that were decided against them by a final judgment, and that they did not appeal. The district court's ruling requiring NPS to engage in another lengthy NEPA process is unwarranted and ignores the "rule of reason" which this Court in Yosemite I held must guide the NEPA inquiry. See 348 F.3d at 800 n.2. It should be reversed.

CONCLUSION

This Court should reverse the judgment of the district court and uphold the validity of the 2005 Revised CMP.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,647 words.

DAVID C. SHILTON

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for appellants notes the following related cases:

1. Friends of Yosemite, et al. v. Kempthorne, et al., No. 07-15791 (9th Cir., docketed on May 3, 2007). This is the defendants' appeal from the final judgment in this case. As noted supra at 1, defendants intend to move to consolidate this appeal with the instant appeal.

2. Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003) (Yosemite I). See discussion supra at 3-6.

3. Friends of Yosemite Valley v. Norton, 366 F.3d 731 (9th Cir. 2004) (Yosemite II). See discussion supra at 7-8.

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CERTIFICATE OF SERVICE

I hereby certify that a copies of the foregoing Opening Brief of Appellants have been served as noted below, postage prepaid, this 4th day of May, 2007, upon the following counsel of record:

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